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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

C.M., on her own behalf and on behalf of her
minor child, B.M.; L.G., on her own behalf and
on behalf of her minor child, B.G.; M.R., on her
own behalf and on behalf of her minor child,
J.R.; O.A., on her own behalf and on behalf of
her minor child, L.A.; and V.C., on her own
behalf and on behalf of her minor child, G.A.,

Plaintiffs,

v.

United States of America,
Defendant.

A.P.F. on his own behalf and on behalf of his
minor child, O.B.; J.V.S. on his own behalf and
on behalf of his minor child, H.Y.; J.D.G. on his

No. 2:19-cv-05217-SRB

**PLAINTIFFS' MOTION TO
COMPEL *IN CAMERA*
REVIEW OF DOCUMENTS**

No. 2:20-cv-00065-SRB

own behalf and on behalf of his minor child,
M.G.; H.P.M. on his own behalf and on behalf
of his minor child, A.D.; M.C.L. on his own
behalf and on behalf of his minor child, A.J.;
and R.Z.G. on his own behalf and on behalf of
his minor child, B.P.,

Plaintiffs,

v.

United States of America,

Defendant.

Plaintiffs request that the Court review *in camera* 24 documents that the government asserts are protected by the deliberative process privilege. The limited information available to Plaintiffs indicates that the government has improperly redacted segregable factual information in these documents, and that Plaintiffs are entitled to any deliberative discussions under the *Warner* balancing test. *See Karnoski v. Trump*, 926 F.3d 1180, 1206 (9th Cir. 2019) (citing *F.T.C. v. Warner Commc'ns, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984)); *see also* Order, C.M. ECF No. 142; *A.P.F.* ECF No. 141. These 24 documents appear highly relevant to Plaintiffs' claims and the government's likely defenses, and to contain information not available elsewhere. Plaintiffs therefore request that the Court order Defendant to submit for review *in camera* the documents identified in **Attachment A**.

BACKGROUND

As discussed during the April 26, 2022 discovery dispute hearing, *see generally* Hr'g Tr. (Apr. 26, 2022), following the Court's February 24, 2022 Order on Plaintiffs' Motion to Compel, Plaintiffs asked the government to reevaluate its privilege logs and withdraw any privilege assertions inconsistent with the Court's ruling. Attachment C, Email from D. Reiter to P. MacWilliams (Feb. 25, 2022). As part of the meet and confer process related to Plaintiffs' request, Plaintiffs identified 57 sample documents produced by the Department of Justice (DOJ), the Department of Homeland Security

1 (DHS) headquarters, Customs and Border Patrol (CBP), and Immigration and Customs
2 Enforcement (ICE), and asked the government to review its assertions of the
3 deliberative process privilege as to those documents (“Plaintiffs’ March Sample Set”).
4 Attachment D, Letter from D. Reiter to P. MacWilliams (Mar. 22, 2022).

5 After reevaluating the 57 documents in Plaintiffs’ March Sample Set, the
6 government revised its redactions for 23 documents. Attachment E, Email from P.
7 MacWilliams to D. Reiter (Mar. 31, 2022); Attachment F, Letter from D. Reiter to P.
8 MacWilliams (Apr. 12, 2022). Of those 23 documents, the government withdrew its
9 privilege assertions entirely as to 14 documents, and significantly modified its
10 redactions for three additional documents.¹ *Id.* The government also revised the
11 privilege log descriptions for a significant number of the documents for which the
12 government maintained its assertion of the deliberative process privilege.

13 As a result of the government’s revisions to its privilege log descriptions for the
14 Plaintiffs’ March Sample Set, Plaintiffs identified 24 documents for which they dispute
15 the government’s deliberative process privilege claims. Specifically, the revised
16 privilege logs indicate that the government has likely maintained improper redactions
17 of segregable factual information and, even if the redactions include deliberative
18 information, that Plaintiffs are entitled to some or all of the redacted material under the
19 balancing test set forth in *F.T.C. v. Warner Commc’ns, Inc.*, 742 F.2d 1156, 1161 (9th
20 Cir. 1984), and adopted by the Court’s February 24, 2022 Order. Order at 3-5, *C.M.*
21 ECF No. 142; *A.P.F.* ECF No. 141 (quoting *Karnoski*, 926 F.3d at 1206). Plaintiffs
22 informed the government of their intent to move for *in camera* review of the documents,
23 and provided the government an opportunity to revise or withdraw its privilege
24 assertions for the 24 documents. See Attachment F. The government declined to
25 withdraw or narrow its privilege assertions for any of the documents. Attachment G,
26 Email from P. MacWilliams to D. Reiter (Apr. 19, 2022). At the April 26, 2022 hearing,
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28 ¹ The government also made minor revisions to its redactions for six documents.

the Court granted Plaintiffs leave to file a motion to compel seeking *in camera* review of the 24 documents, and ordered the government to conduct a broader review of its deliberative process privilege assertions to conform them to the guidance in the Court’s February 24, 2022 Order. *C.M.* ECF No. 173; *A.P.F.* ECF No. 160.

STANDARD OF REVIEW

“A party may move under Rule 37 of the Federal Rules of Civil Procedure for an order compelling disclosure or discovery.” *Ocean Garden Prod. Inc. v. Blessings Inc.*, 2020 WL 4284383, at *2 (D. Ariz. July 27, 2020) (citing Fed. R. Civ. P. 37(a)(1)). When a party withholds discoverable information as privileged, the party “has the burden of establishing the existence and applicability of each of the privileges asserted in all respects.” *United States v. Harddrives, Inc.*, 1991 WL 12008395, at *2 (D. Ariz. Feb. 4, 1991) (citing *Dole v. Milonas*, 889 F.2d 885, 889 (9th Cir. 1989)). “The burden to sustain a claim of privilege is heavy because privileges are ‘not lightly created nor expansively construed, for they are in derogation of the search for the truth.’” *Diamond Resorts U.S. Collection Dev., LLC v. Reed Hein & Assocs.*, 2020 WL 6487660, at *3 (D. Nev. Nov. 4, 2020) (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974)); see also *Briggs v. Adel*, 2020 WL 4003123, at *2 (D. Ariz. July 15, 2020) (discussing the “heavy burden of the party opposing discovery”) (internal quotations omitted).

ARGUMENT

The deliberative process privilege is “strictly confined within the narrowest possible limits consistent with the logic of its principles.” *N. Pacifica, LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1122 (N.D. Cal. 2003) (quoting *Sanchez v. Johnson*, 2001 WL 1870308, at *6 (N.D. Cal. Nov. 19, 2001)); see also *Thomas v. Cate*, 715 F. Supp. 2d 1012, 1044 (E.D. Cal. 2010) (stating that the deliberative process privilege “should be narrowly construed because confidentiality may impede full and fair discovery of the truth.”). Accordingly, “the privilege protects opinions and deliberations, but generally not ‘facts and evidence.’” *Novoa v. GEO Grp., Inc.*, 2020 WL 6694317, at *6 (C.D. Cal. Oct. 8, 2020) (quoting *Warner*, 742 F.2d at 1161). “[I]f

1 the government can segregate and disclose non-privileged factual information within a
 2 document, it must.” *Karnoski*, 926 F.3d at 1204 (quoting *Loving v. Dep’t of Defense*,
 3 550 F.3d 32 (D.C. Cir. 2008)); *see also* Order at 6, *C.M.* ECF No. 142; *A.P.F.* ECF No.
 4 141.²

5 The government’s sweeping redactions to several documents in Attachment A
 6 suggest that the government has made insufficient efforts to distinguish factual and
 7 deliberative information. *See, e.g.*, CD-US-0017259 (heavily redacted email chain
 8 described as “Pre-decisional discussion between EO USA and USAO NM regarding
 9 resource constraints related to the local implementation of ZTP. Document discusses
 10 potential changes related to the same that have yet to be decided”); CD-US-0017269
 11 (entirely redacted email described as “Pre-decisional document discussing an inquiry
 12 from the Attorney General regarding the potential use of USMS facilities”); CD-US-
 13 0017478 (entirely redacted email chain originally described as “USAO NM discussing
 14 issues with implementing ZTP with USO TXW to gather information to present to USA
 15 for a decision”; revised description is “Pre-decisional discussion between USANM and
 16 USA TXW regarding local implementation of ZTP”); CD-US-0153446 (entirely
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 19 ² The government also has not properly invoked the privilege. Aside from the
 20 two DOJ productions at issue in Plaintiffs’ earlier motion to compel, the government
 21 has not established that a department head or high-ranking official from each agency is
 22 invoking the privilege with respect to the government’s productions. As the
 23 government recognizes, *see* Weinsheimer Decl., *C.M.* ECF No. 122-1; *A.P.F.* ECF No.
 24 121-1, the deliberative privilege “must be invoked by an agency head or his delegate,
 25 having control over the requested document, after having personally reviewed the
 26 documents for which the privilege is asserted.” *Unknown Parties v. Johnson*, 2016 WL
 27 8199308, at *5 (D. Ariz. July 21, 2016) (explaining purpose of requirement). Because
 28 the government has made no attempt to do so here, the government’s invocation of the
 privilege is invalid. *Mayfield v. County of Los Angeles*, 2020 WL 2510649, at *1 (C.D.
 Cal. Mar. 20, 2020) (“prima facie burden of . . . invoking the privilege” not met without
 “sworn declaration” from agency head). Should the government once again submit a
 declaration offering a post hoc justification of the government’s privilege assertions
 with respect to the 24 documents, the Court should review it critically. *See, e.g.*, *United*
States ex rel. Poehling v. UnitedHealth Grp., Inc., 2018 WL 8459926, at *12 (C.D. Cal.
 Dec. 14, 2018) (finding that the “Government’s assertion is procedurally flawed” even
 after the government submitted three agency declarations, because “[t]here is no
 evidence before the Court even suggesting that senior agency personnel became
 involved in the process until after the original privilege logs were produced.”).

1 redacted DHS memorandum described as “Predecisional deliberations regarding
2 options other than family detention during pending removal proceedings”).³

3 Moreover, as the Court explained in its February 24, 2022 Order, “[t]he
4 deliberative process privilege is not absolute.” Order at 3, *C.M.* ECF No. 142; *A.P.F.*
5 ECF No. 141. The privilege is qualified, and a litigant may obtain deliberative materials
6 where “the litigant’s need for the materials and the need for accurate fact-finding
7 override the agency’s interest in non-disclosure.” *Id.* To determine whether a plaintiff
8 can overcome the privilege, courts in the Ninth Circuit consider four factors: 1) the
9 relevance of the evidence; 2) the availability of other evidence; 3) the government’s
10 role in the litigation; and 4) the extent to which disclosure would hinder frank and
11 independent discussion regarding contemplated policies and decisions. *Id.* (citing
12 *Karnoski*, 926 F.3d at 1206). All four factors favor disclosure here.

13 First, the withheld information is highly relevant to Plaintiffs’ claims and the
14 documents sought are similar to the types of documents the Court previously ordered
15 the government to produce under the *Warner* balancing test. *See* Order at 10, *C.M.*
16 ECF No. 142; *A.P.F.* ECF No. 141 (ordering disclosure of a document under the
17 *Warner* balancing test because it “reflect[ed] concerns by attorneys on the [Southwest
18 border] about the treatment of children by CBP” and went “to the heart of the issues
19 raised in these cases”); *id.* (ordering parts of a document produced under the *Warner*
20 test because it addressed “issues about family separation that are highly relevant to this
21 case”). The vast majority of the documents are policy memoranda and agency
22 communications reflecting the government’s intent in developing and implementing
23 family separation and the Zero Tolerance Policy. The remaining documents relate to
24 the government’s knowledge of the harms suffered by victims of the family separation
25 policy. For example, the withheld information includes an assessment of “pros” and

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27 ³ To avoid inundating the Court with privilege logs and documents, Plaintiffs
28 attach a consolidated privilege log containing only the entries for the 24 documents for
which *in camera* review is requested. If the Court wishes to review redacted versions
of the documents, Plaintiffs would be happy to provide them.

1 “cons” of the family separation policy. *See* Attachment B at CD-US-0192513; CD-US-
2 0045770A; and CD-US-0127737A (logged by Defendant as “Pre-decisional
3 deliberations, including pros and cons, regarding family unit separations and changes
4 to credible fear process”). Other documents appear to reflect concerns raised by various
5 government officials—including the DHS Office of Civil Rights and Civil Liberties—
6 regarding the policy, as well as the government’s analysis of the successes of and
7 problems with the El Paso Pilot program. *See* Attachment B at CD-US-0063242
8 (logged by Defendant as “Memorandum from the Office of Civil Rights and Civil
9 Liberties (CRCL) detailing serious constitutional, U.S. law and treaty concerns
10 regarding the apprehension, custody, and transportation of alien children.”); CD-US-
11 0050134 (logged by Defendant as “Decision paper with options and recommendations
12 but no decision”); and CD-US-0026417A (logged by Defendant as “Predecisional
13 deliberations and recommendations regarding possible prosecution policies for
14 consideration relating to members of FAMUs in El Paso sector”).

15 Second, Plaintiffs are unable to obtain comparable information about the
16 deliberations that led to the family separation policy, the government’s intent and
17 knowledge of potential problems with the policy prior to its implementation, and the
18 implementation of the policy because all of the relevant information is in the
19 government’s possession. *See* Order at 10, *C.M.* ECF No. 142; *A.P.F.* ECF No. 141;
20 *see also Karnoski*, 926 F.3d at 1206; *Coleman v. Sterling*, 2011 WL 13176814, at *4
21 (S.D. Cal. June 13, 2011).

22 Third, as the Court’s February Order recognized, the government’s role in the
23 litigation favors disclosure because “the government’s role in the case is that of
24 defendant and not a witness.” Order at 10, *C.M.* ECF No. 142; *A.P.F.* ECF No. 141.
25 Further, the government’s decision-making process is “by no means collateral to the
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litigation.” *N. Pacifica*, 274 F. Supp. 2d at 1124 (citing *United States v. Irvin*, 127 F.R.D. 169, 174 (C.D. Cal. 1989)).⁴

Fourth, any concerns that production of the withheld information could “hinder frank and independent discussion” are mitigated by the Protective Order in place. *See* Order at 10, C.M. ECF No. 142, A.P.F. ECF No. 141; *see also Al Otro Lado, Inc. v. Wolf*, 2020 WL 6449152, at *5 (S.D. Cal. Nov. 2, 2020) (“The deliberative process privilege is designed to allow agencies to freely explore possibilities . . . without fear of *public* scrutiny [T]he Protective Order will sufficiently protect defendants’ interests.”) (cleaned up).

In sum, Plaintiffs’ need for the documents sought by this motion, and Plaintiffs’ and the public’s strong interest in accurate fact-finding, override any government interest in non-disclosure. Accordingly, Plaintiffs request that the Court order the government to promptly produce the documents identified in **Attachment A** for *in camera* review, so that the Court can determine whether the materials should be produced to Plaintiffs.

⁴ *See also In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 145 F.3d 1422 (D.C. Cir. 1998) (observing that “[i]f the plaintiff’s cause of action is directed at the government’s intent, . . . it makes no sense to permit the government to use the privilege as a shield.”), *on reh’g in part*, 156 F.3d 1279 (D.C. Cir. 1998); *Toomey v. Arizona*, 2021 WL 1545990, at *3 (D. Ariz. Apr. 20, 2021) (“Where the government is itself a defendant, the reason for the privilege evaporates. . . . If the government itself is accused of wrongdoing, then the privilege would not necessarily protect proper governmental functioning but instead might shield government malfeasance.”); *Arizona Dream Act Coal v. Brewer*, 2014 WL 171923, at *3 (D. Ariz. Jan. 15, 2014) (holding that the *Warner* factors favored disclosure where “[t]he government is a party to this case and its intent in crafting the policy is a primary issue.”).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court direct the government to produce for *in camera* review the 24 documents listed on **Attachment A** within 7 days of the Court's Order.

RESPECTFULLY SUBMITTED this 6th day of May, 2022.

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